

No. 10,326

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

H. A. PIERCE,

Appellant,

VS.

ALBERT L. WAGNER,

Appellee.

Upon Appeal from the District Court of the United States,
for the Northern District of California,
Northern Division.

BRIEF FOR APPELLEE.

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Subject Index

| | Page |
|--|------|
| Argument | 1 |
| The complaint states no claim showing that the pleader is entitled to relief..... | 1 |
| The District Court had no jurisdiction of the cause be- cause the amount in controversy was less than three thousand dollars | 3 |

Table of Authorities Cited

| Cases | Page |
|---|------|
| Buckley v. Gray, 110 Cal. 339..... | 3 |
| Feldesman v. McGovern, 44 Cal. App. (2d) 566..... | 2 |
| Maryland Casualty Co. v. Price, 231 Fed. 397..... | 2 |
| National Savings Bank v. Ward, 100 U. S. 195..... | 3 |
| Porter v. Peckham, 44 Cal. 204..... | 3 |
| | |
| Texts | |
| 3 California Jurisprudence 609..... | 3 |
| 3 California Jurisprudence 672..... | 3 |



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ARGUMENT.

**THE COMPLAINT STATES NO CLAIM SHOWING THAT THE
PLEADER IS ENTITLED TO RELIEF.**

This action seeks to recover damages claimed to have resulted from negligence of an attorney in the performance of his duties as such.

The complaint is in two counts, the second count re-pleading in its entirety the first count and adding thereto certain additional matters.

It appears from the complaint that a certain estate of a decedent was being probated in the Superior Court of Sacramento County, California; that four

named persons were entitled to succeed, each to an undivided one-sixth interest in the estate; that these four engaged one Reuben G. Lenske, an attorney-at-law, to represent their interests, and that Lenske associated defendant, an attorney-at-law admitted to practice in California, in the matter of said representation; that defendant was negligent in the performance of his duties,—this allegation being general, without the specification of any act of negligence;—that damage resulted from this negligence, first, to Lenske, in the sum of \$2920.80, and, second, to plaintiff, in the sum of \$970.40.

As a complaint against an attorney for negligent performance of his duties as such, the complaint throughout is fatally defective, in that no negligence is pleaded. This is so because in complaints against attorneys for negligence it is not sufficient to allege negligence in general terms. *Feldesman v. McGovern*, 44 Cal. App. (2d) 566, at page 568.

In the cited case the Court holds that:

“In an action brought by a client against his attorney for the latter’s alleged negligence in failing to perform some act in behalf of the client, the complaint must not only specify the act, but must specifically allege and the plaintiff must prove that if the attorney had performed the act it would have resulted beneficially to the client.”

See also:

Maryland Casualty Co. v. Price, 231 Fed. 397.

THE DISTRICT COURT HAD NO JURISDICTION OF THE CAUSE
BECAUSE THE AMOUNT IN CONTROVERSY WAS LESS
THAN THREE THOUSAND DOLLARS.

For negligence in the performance of his duties an attorney-at-law is responsible to his client alone.

“It is a general doctrine, sustained by an overwhelming weight of authority, that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone; that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties.”

3 *California Jurisprudence* 672.

See also:

Buckley v. Gray, 110 Cal. 339;

National Savings Bank v. Ward, 100 U. S. 195.

Defendant was not the attorney for Lenske. It clearly appears that Lenske, having undertaken the representation of these heirs, associated defendant with him, and that defendant performed services as an attorney-at-law for these heirs. This made defendant the attorney for the heirs, one of whom was plaintiff.

“An agent, if properly authorized, may, of course, employ an attorney on behalf of his principal, and such employment does not create the relation of attorney and client between the attorney and the agent.”

3 *California Jurisprudence* 609.

See also:

Porter v. Peckham, 44 Cal. 204.

For negligence in the performance of defendant's duties as an attorney, therefore, if such negligence had been properly pleaded, only the heirs, or one or more of them, may sue. Plaintiff, one of the heirs, sues in his own right, claiming that by the negligence of defendant he was damaged in the sum of \$970.40. He seeks to build up the amount in controversy by suing as assignee of Lenske for the recovery of \$2920.80, in which sum Lenske claims to have been damaged by reason of the negligence of defendant in the performance of his duties as an attorney-at-law for other people. Lenske has no such cause of action, and so plaintiff's complaint in respect to the matter of jurisdiction is left to rest alone upon his own cause of action, in which he seeks to recover a sum far below the jurisdictional requirements.

It is respectfully submitted that the order of dismissal should be affirmed.

Dated, Sacramento, California,
March 5, 1943.

Respectfully submitted,
VAN DYKE & HARRIS,
Attorneys for Appellee.